UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
JEFFREY KELE SEWELL JOY ELAINE SEWELL,	:	03-10764-WHD
Debtors.	:	
_____	:	
OLIVER MILTON,	:	
Movant,	:	
v.	:	
JEFFREY KELE SEWELL,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Respondent.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion to Reopen Case and for Modification of the Discharge Injunction filed by Oliver Milton (hereinafter "Movant") in the above-captioned bankruptcy proceeding. After conducting a hearing on the Motion on October 1, 2004, the Court took this case under advisement. This matter is a core proceeding, which falls within the subject matter jurisdiction of the Court. *See* 28 U.S.C. §§ 1334; 157(b)(2)(O).

FACTS AND PROCEDURAL HISTORY

Movant was employed by Crisp Regional Hospital (hereinafter "CRH"). While on duty at CRH, Movant injured his back. The Debtor, a treating physician at CRH, evaluated

Movant, prescribed medication, and attempted to obtain an MRI scan for Movant. The Debtor could not obtain such a scan, as he was not authorized by CRH to do so. Subsequently, Movant was also treated by Dr. Perry Thomas, a physician at CRH.

On December 17, 2003, Movant filed an amended complaint in state court in which he alleged a malpractice claim against the Debtor. Movant's originally filed complaint alleged a similar cause of action against Dr. Thomas and CRH. The Debtor has no medical malpractice insurance that would cover Movant's claim.

On April 3, 2003, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The Debtor received a discharge, and the case was closed on September 25, 2003. The Debtor reopened his case for the purpose of amending his schedules to add Movant as a creditor, and the case was closed a second time on April 27, 2004. On August 16, 2004, Movant filed a motion to reopen the bankruptcy case for the purpose of modifying the discharge injunction to allow him to continue with his state court suit. If successful, Movant proposes to continue his action against the Debtor solely for the purpose of establishing liability. The Debtor opposes the Motion.

CONCLUSIONS OF LAW

The filing of a bankruptcy petition operates to stay litigation involving prepetition claims against a debtor. *See* 11 U.S.C. § 362(a)(1). Upon the entry of a discharge in accordance with § 727, the debtor is discharged from personal liability for the debt. 11

U.S.C. § 727. "A discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt." *In re Edgeworth*, 993 F.2d 51, 53 (5th Cir. 1993). Following the discharge, § 524(a)(2) enjoins "actions against a debtor,"[1] *Owaski v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 883 F.2d 970, 972 (11th Cir. 1989), but § 524(e) "specifies that the debt still exists and can be collected from any other entity that might be liable." *In re Edgeworth*, 993 F.2d at 53; *see also Jet Florida*, 883 F.2d at 973 ("However, a discharge will not act to enjoin a creditor from taking action against another who also might be liable to the creditor."). Therefore, a creditor may be permitted to establish the debtor's nominal liability for a claim solely for the purpose of collecting the debt from a third party, such as an insurer or guarantor. *Id.*; *see also In re Walker*, 927 F.2d 1138, 1142 (10th Cir. 1991) ("It is well established that this provision permits a creditor to bring or continue an action directly against the debtor for the purpose of establishing the debtor's liability when, as here, establishment of that liability is a prerequisite to recovery from another entity.").

"A debtor defendant shielded by a § 524(a) bankruptcy discharge may be sued to

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[1] Section 524(a)(2) provides as follows: "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived . . . ." 11 U.S.C. § 524(a)(2).

establish the liability of a third party only if the debtor is a necessary party--'a party in whose absence the suit against the third party would be dismissed under applicable tort and procedural laws.'" *In re Loewen Group, Inc.*, 2004 WL 1853137 (E.D. Pa. Aug. 18, 2004); *In re Czuba*, 146 B.R. 225 (Bankr. D. Minn. 1992). To determine whether the debtor is a "necessary party" to the litigation, the bankruptcy court considers whether: "'1) in the [party's] absence complete relief cannot be accorded among those already parties; and 2) the [party] claims an interest relating to the subject of the action and is so situated that the disposition of the action in the [party's] absence'" will either impair or impede the party's ability to protect its interest or "'leave anyone already a party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the [party's] claimed interest.'" *Id*. at *25 (quoting *In re Czuba*, 146 B.R. 225 (Bankr. D. Minn. 1992)).

Therefore, if Movant would be unable to proceed with his claim against CRH without naming the Debtor as a defendant, the Debtor would be a "necessary party" to the action. Movant asserts that the presence of the Debtor as a defendant in the lawsuit is required because Movant's claim against CRH is based upon the theory that the Debtor acted negligently and CRH is vicariously liable to Movant for the Debtor's conduct.

In *In re Czuba*, the bankruptcy court considered the issue of whether the discharged debtor was a "necessary party" to an action in which the plaintiff was asserting that a non-debtor third-party was vicariously liable for the debtor's actions. In re Czuba, 146 B.R. 225 (Bankr. D. Minn. 1992). The court concluded that the debtor was not a necessary party

because, under Minnesota law, the debtor and the third-party would be jointly and severally liable for the damages arising from the debtor's conduct and the plaintiff could proceed against either the debtor or the third party for the entire amount of damages. *Id*. The same is true under Georgia law. *See Miller v. Grand Union Co.*, 512 S.E.2d 887 (Ga. 1999) ("Georgia courts, as well as the courts of most other states, have treated the master as if he were a joint tortfeasor with his servant."). Further, the Court is persuaded that, under Georgia law, the dismissal of the employee or servant on grounds other than an adjudication on the merits would not bar the pursuit of the employer or master on a theory of vicarious liability.

In *Miller,* the plaintiff alleged that a security guard had falsely imprisoned and assaulted her. *Miller v. Grand Union Co.*, 512 S.E.2d at 887. After executing a covenant not to sue the security guard, the plaintiff filed suit against the security guard's employer under a theory of vicarious liability. The employer moved for summary judgment on the basis that the covenant not to sue had extinguished the employer's liability. *Id*. The court concluded that the "execution of either a covenant not to sue or a release in favor of an employee does not discharge an employer who is alleged to be vicariously liable for the tortious acts or omissions of that employee, unless the instrument names the employer." *Id.* at 888. Accordingly, because the employee's liability had not been extinguished by the execution of the covenant not to sue, the plaintiff was still free to establish the facts necessary to show that the employee was negligent and that the employer was vicariously

liable for the employee's conduct, notwithstanding the fact that the employee was not named as a defendant.

This case resembles *Miller* in that, just as the covenant not to sue rendered the employee judgment proof, but did not extinguish her liability, the Debtor's bankruptcy discharge has not extinguished the Debtor's potential malpractice liability, but merely rendered any resulting debt non-collectible from the Debtor. It should follow from the reasoning employed in *Miller* that Movant would be entitled to proceed against CRH under a theory of vicarious liability, notwithstanding the Debtor's dismissal from the suit.

Further support for this conclusion can be found in *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 528 S.E.2d 508 (Ga. 2000). In that case, the plaintiffs sued Merrill Lynch and its employee for damages arising from allegedly improper conduct regarding the administration of a profit-sharing plan and trust. The plaintiffs dismissed their claims against the employee with prejudice, but specifically stated that the dismissal did not apply to Merrill Lynch. Subsequently, the trial court dismissed the remaining claims against Merrill Lynch, finding that the plaintiff "had failed to state a claim" because the "claims against Merrill Lynch were predicated on the purported acts" of the employee, "whom the plaintiffs had voluntarily dismissed with prejudice from the case." *Id.* at 509. The Court of Appeals affirmed, concluding that the dismissal with prejudice "operated as an adjudication on the merits, and that, in a suit by the third party based on the doctrine of *respondeat superior*, a judgment on the merits in favor of the employee against the third party is *res judicata* in

favor of the employee." *Id.* (citing *Hedquist v. Merrill Lynch, et al.*, 511 S.E.2d 558 (1999)). The Georgia Supreme Court agreed that, under the doctrine of *res judicata*, the employer is entitled to a dismissal when an adjudication on the merits has been made as to the fact that the employee is not liable. *Id*. However, the court disagreed with the Court of Appeals' assessment that the plaintiffs' voluntary dismissal of their claims against the employee constituted an adjudication on the merits. *Id*. Accordingly, the court found that it was error to grant summary judgment to the employer on the vicarious liability claim. *See also Wilson v. Ortiz*, 501 S.E.2d 247 (Ga. App. 1998) (when the trial court dismissed claim for negligence against employee for failure to perfect service, it was error to grant summary judgment to the employer as to the vicarious liability claim because the dismissal of the claim against the employee was not an adjudication on the merits).

From these cases, the Court finds that, under Georgia law, an action against the employer or agent alleging vicarious liability can proceed, regardless of whether the employee or servant is a named defendant, so long as no finding on the merits has been made as to the employee/servant's liability. In this case, the fact that the Debtor must be dismissed from the action because of his bankruptcy discharge is not an adjudication on the merits as to whether the Debtor rendered negligent care to Movant. Accordingly, his dismissal from the action should not prevent Movant from establishing that the Debtor and/or Dr. Thomas rendered negligent care to Movant and that CRH is vicariously liable for their conduct. Under the analysis employed by the court *In re Czuba*, the Debtor is not a

necessary party to Movant's action against CRH, and, accordingly, Movant's action cannot proceed against the Debtor. Therefore, the Debtor "should be voluntarily dismissed from the state court proceeding so that [Movant] can proceed against the other defendants, and if voluntary dismissal is not possible then the [Debtor] should move the state court for such a dismissal." *In re Czuba*, 146 B.R. at 241. That being said, the Debtor's bankruptcy discharge does not protect CRH from liability, and Movant is free to proceed in his action and to prove the facts necessary to establish the vicarious liability of CRH.[2]

CONCLUSION

Having given this matter its careful consideration, the Court hereby concludes that the Movant's Motion for Modification of Discharge Injunction should be, and hereby is, **DENIED**.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of November, 2004.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

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[2] The Court notes that the Debtor's bankruptcy discharge does not alleviate the Debtor of the obligation to comply with discovery requests or appear as a witness at trial if properly subpoenaed . *See In re Robertson*, 244 B.R. 880, 883 (Bankr. N.D. Ga. 2000) (Drake, J.); *In re Doar*, 234 B.R. 203, 206-07 (Bankr. N.D. Ga. 1999) (Kahn, J.).